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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-771

MURRAY ANDERSON,
t/a Anderson's Texaco Service Station
and
JOSEPH J. GRISH, t/a Grish Servicecenters, Inc.,
On Behalf of Themselves and Others Similarly Situated, *Petitioners*

v.

JOHN T. DUNLOP, GEORGE SCHULTZ, HERBERT STEIN, ARTHUR BURNS, EARL L. BUTZ, FREDERICK DENT, PETER BRENNAN, JAMES LYNN, CASPER WEINBERGER, ROY ASH, VIRGINIA KNAUER, ANNE ARMSTRONG, DARRYL TRENT, The President's Cost of Living Council

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Petitioners Murray Anderson and Joseph J. Grish pray that a writ of certiorari issue to review the decison and judgment of the Temporary Emergency

Court of Appeals entered on October 10, 1973, which reversed the order of the United States District Court for the District of Columbia entered on August 24, 1973, granting Plaintiffs' motion for preliminary injunction and enjoining Defendants from implementing or enforcing Phase IV Oil Regulations insofar as they applied to Petitioners and the class and ordering the Complaint to be dismissed.

The following opinions and orders of the District Court and the Temporary Emergency Court of Appeals are not yet officially reported. They are printed in the Appendix as indicated.

(1) Opinion of United States District Court for the District of Columbia granting Plaintiffs' motion for preliminary injunction dated August 24, 1973.

(2) Opinion of the Temporary Emergency Court of Appeals reversing the order of the United States District Court dated October 10, 1973.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on October 10, 1973. The jurisdiction of this Court is invoked pursuant to Section 211 (f), (g) of the Economic Stabilization Act of 1970, as amended, and pursuant to Title 28, United States Code.

QUESTIONS PRESENTED

1. Can a party be required to exhaust administrative remedies when a trial court has found that time is of the essence and that the party would sustain irreparable injury in the interim unless a preliminary injunction is issued?

2. Is a party required to exhaust an administrative remedy which reposes the reviewing authority in the very same individuals who participated in and were responsible for the challenged regulations and who had previously heard and rejected the objections to be filed in the administrative procedure?

3. Can a party be required to exhaust administrative remedies, when the administrative enabling statute —the economic stabilization Act—specifically provides for direct and immediate judicial injunctive relief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution.

The statutory provisions involved are Sections 207 (b) and 211 (d) (1)-(2) of the Economic Stabilization Act of 1970, as amended and Sections 155.41 through .43 of Title 38 of the Code of Federal Regulations.

The text of the Fifth Amendment and the statutory provisions are printed in the Appendix.

STATEMENT OF THE CASE

Petitioners filed the Complaint herein on August 15, 1973, in the United States District Court for the District of Columbia. They alleged that adoption of proposed Phase IV regulations by the Cost of Living Council, as set forth in Subpart L—Petroleum and Petroleum Products—, pursuant to the authority of the Economic Stabilization Act of 1970 as amended were "arbitrary and capricious" within the meaning of those terms as set forth in the Act. In addition, Petitioners alleged such regulations were invidiously dis-

criminatory in violation of the Fifth Amendment to the United States Constitution. The "proposed" regulations were announced on July 19, 1973, and comments invited. Petitioners sought to represent themselves and a class of all branded gasoline retailers doing business in the United States.

The Complaint was filed to enjoin Defendants and its members, employees, officers and agents from, in any way, implementing or enforcing proposed Phase IV regulations for petroleum retailers as to Plaintiffs and the class. The District Court's jurisdiction was based on 28 U.S.C. § 1331. The action was brought under the authority of §§ 211 (d) (1) and (2) of the Economic Stabilization Act as amended.

On August 16, 1973, the District Court denied Petitioners' Motion for Temporary Restraining Order on the basis of representations by Defendants' counsel that the Cost of Living Council was still deliberating on the final form of the regulations. The District Court's denial was based solely upon the premise that since no regulations had been finally promulgated there was nothing which it could enjoin.

Subsequently, it was disclosed that the affidavits and representations of Defendants' counsel concerning the contingency of the proposed regulations were erroneous. As a matter of fact, final Phase IV regulations relating to Subpart L—Petroleum and Petroleum Products—were published in final form on August 17, 1973. Thereupon, Petitioners requested the District Court for a new hearing and amended its initial request to include a Motion for Preliminary Injunction.

On August 22, 1973, the District Court held a hearing on Petitioners' Motion for Preliminary Injunction.

The said regulations as published, were scheduled to go into effect on August 31, 1973.

At the conclusion of the hearing the District Court determined in part that:

"Plaintiffs and the class are the only class of retailers employing sixty or fewer individuals who are not exempt from the regulations;

"There is no factual or statistical information or material justifying the failure to make the small business exemption under the regulations applicable to plaintiffs and the class; and

"There is no rational relationship between the objectives of the regulations and the denial to plaintiffs and the class of their small business exemption."[1]

The Court further found that:

"Subpart L of the Phase IV Oil Regulations as applied to plaintiffs and the class is arbitrary and capricious within the meaning of the Act;

"Subpart L as applied to plaintiffs and the class discriminates against plaintiffs and the class and violates the due process clause of the Fifth Amendment; and

"The provisions and regulations of Subpart L as applied to plaintiffs and the class are arbitrary and discriminatory and bear no rational relationship to the ends sought to be achieved by the Act or of Phase IV regulations in general and, therefore, violate the due process clause of the Fifth Amendment."[2]

---

[1] See, District Court's Findings of Fact, Numbers 8, 9 and 10 respectively. (3a, 4a)

[2] See, District Court's Conclusions of Law, Number 3, 4 and 5 respectively. (5a)

The Court concluded:

"The application of Subpart L of the August, 1973 Oil Regulation to plaintiffs and the class would require plaintiffs and substantial members of the class to go out of business or otherwise sustain substantial and severe economic injury; and

"Requiring plaintiffs to exhaust their administrative remedies would result in irreparable harm, in that in this case, time is crucial to protect the rights of plaintiffs and the class."[3]

In its Order granting Plaintiffs' Motion for Preliminary Injunction the Court further stated that the Plaintiffs had made a sufficiently strong showing that they were likely to prevail on the merits therein, that irreparable harm would result if the Preliminary Injunction was not issued and that the public interest would be harmed by a refusal to issue such an Injunction. (1a)

On August 24, 1973, Defendants filed an appeal with the Temporary Emergency Court of Appeals.

On October 10, 1973, said Court issued an Order dismissing the Complaint. The sole basis for its decision was that Plaintiffs failed to exhaust available administrative remedies. The Court stated that they were satisfied that an adequate administrative remedy was available to Plaintiffs. It left undisturbed, and virtually undiscussed, all findings of the District Court.

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[3] See, District Court's Findings of Fact, Number 16 and 19 respectively. (4a)

REASONS FOR GRANTING THE WRIT

I.

The Temporary Emergency Court of Appeals Has Decided a Federal Question in a Way Which Conflicts With Applicable Decisions of This Court

This Court has warned that the exhaustion requirement is not to be applied blindly in every case. *McGee* v. *United States,* 402 U.S. 479 (1971).

The doctrine is less an inflexible command than a general guideline if an immediate appeal is necessary to give realistic protection to a claimed right. See, *Bristol Myers Company* v. *Federal Communications Commission,* 469 F.2d 1116 (2d Cir., 1973).

This Court has stated that administrative procedures need not be exhausted if plaintiffs could find themselves exhausted before their administrative remedies. *National Labor Relations Board* v. *Marine Workers,* 391 U.S. 418 (1968).

This is precisely what the District Court determined as a matter of fact, would happen in this case. The Court stated that requiring Plaintiffs to exhaust their administrative remedies would result in irreparable harm, in that in this case, time is crucial to protect the rights of Plaintiff and the class.

This basic rule also is set forth in the principal case of *Martinez* v. *Richardson* where that Court held that it was error to apply the exhaustion doctrine where to do so would result in irreparable harm or where time is crucial to the protection of substantive rights. 472 F.2d 1121 (10th Cir. 1973)

The Appeals Court did not challenge the facts found by the District Court that the application of the chal-

lenged regulations would either force Plaintiffs and substantial members of the class out of business or otherwise sustain substantial and severe economic injury.

In this case, of course, such injury is irreparable. Plaintiffs and the class have no judicial remedy to recover monetary damages as would be true in a case involving defendants other than the Government. Their monetary loss cannot be recovered. Only a preliminary injunction could have saved them from the severe economic loss the District Court found would inevitably be suffered if the discriminatory regulations were applied to Plaintiffs and the class.

Furthermore, for the exhaustion remedy to be applicable, the administrative procedure must be meaningful and adequate. See, *Goldberg* v. *Kelly,* 379 U.S. 254 (1970); *Wheeler* v. *Montgomery,* 397 U.S. 208 (1970); *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965); In re *Murchison,* 349 U.S. 133 (1955); *Wong Yang Sung* v. *McCrath,* 339 U.S. 33 (1950).

These cases hold, in part, that the administrative procedure must be available prior to the occurrence of an injury and a hearing must be held before an impartial examiner not associated with the issuance and promulgation of the challenged regulations. In addition, the procedure must not be an exercise in futility.

The administrative procedure involved herein provides for the filing of hardship exceptions by the approximately 224,000 members of the class. However, the procedure contains no time limit by which the Internal Revenue Service, in the first instance, and, ultimately, the Cost of Living Council had to respond to such requests.

The Appeal Court apparently based its opinion in part on a newsletter of Dr. Dunlop, Director of the Cost of Living Council. The Court said in footnote 2 of its opinion:

> "We note that subsequent to the trial court's order, Dr. Dunlop in his news letter of September 14, 1973, announced that all retail dealers in gasoline and other petroleum products were asked to supply information on forms provided as to their prices, costs and margins on specified dates, and the further statement was made that on the basis of such information and information independently gathered by CLC and its monitoring program, the CLC will act promptly to make appropriate upward adjustments in ceiling prices. On September 28, 1973, an announcement was made by CLC of the revision of retail ceiling prices and the method of computing them with respect to gasoline which would result in increases ranging from 1 cent to 2½ cents per gallon. Such ceiling increases apparently do not meet all of the plaintiffs' objections to the gasoline ceiling regulations and thus render the case moot, but does give further support to the view that applications for relief because of inequities or hardship would receive fair consideration." (13a)

However, Plaintiffs had no opportunity to argue the contents of this newsletter upon which the Court apparently relied, although its substance was totally incorrect.

The inaccuracy of the above newsletter is best evidenced by a letter addressed by Dr. Dunlop to members of the Congress.

In that letter, Dr. Dunlop unequivocally indicated he could not and would not grant the type of relief requested by Plaintiffs. (14a-19a)

Further, the Cost of Living Council—the reviewing authority over any requests for exceptions or challenges filed with the agency by Plaintiffs—had already heard, allegedly considered and rejected the same objections which would have been involved in any future administrative procedure.

The National Congress of Petroleum Retailers, of which Plaintiffs are members, made submissions to the Cost of Living Council in this regard on July 24, 1973, and July 30, 1973. In addition, a number of its affiliates also made written submissions. Counsel of the National Congress of Petroleum Retailers and others met on two (2) separate occasions with Charles Owens and other members of the Cost of Living Council staff after such submissions and discussed in more detail the nature of these objections.

Consistent with these submissions and discussions it is apparent from the face of the August 17 regulations themselves that such objections had been rejected by Defendants.

As was implicit in the District Court's opinion, to force Plaintiffs and the class to go back before the same parties and repeat the same objections so recently unequivocally rejected would be an exercise in sheer futility.

The District Court found that time was of the essence in this case. Requiring Plaintiffs and the class to exhaust administrative remedies, limitless in time, would inflict the irreparable injuries Plaintiffs sought to avoid through judicial injunctive relief. The District Court properly determined that Plaintiffs should not be placed in a position of having to suffer irreparable injury while pursuing an administrative procedure be-

fore the same administrative body which had already rejected the relief sought. These are the same regulations which the Court preliminarily concluded were arbitrary, capricious and invidiously discriminatory.

See, also *R. H. Macy & Company* v. *Tinley,* 249 F. Supp. 788 (D.D.C. 1966), where the Court concluded that plaintiffs should not be required to be placed in a position of having to pursue non-existent, inadequate or futile administrative remedies.

II

The Temporary Emergency Court of Appeals' Decision Conflicts With the Express Language of the Economic Stabilization Act of 1970, as Amended

The decision of the Temporary Emergency Court of Appeals directly contradicts the provisions of the Stabilization Act in regard to the availability of judicial injunctive relief.

The pertinent provisions are § 211. (d)(1) and (2):

> "(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was *arbitrary or capricious,* or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence. Emphasis added.
>
> "(2) A district court of the United States or the Temporary Emergency Court of Appeals may

> enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. . . ."

Had Congress intended to condition injunctive relief on exhaustion of administrative remedies, it could have done so. In regard to this Act, Congress determined not to do so where the specific conditions existed as set forth in (d)(1). Under such conditions the Act, contains specific provisions for direct judicial intervention. The intention of Congress, therefore, as evidenced by the express language of the Statute is that administrative remedies need not be exhausted before seeking judicial relief from "arbitrary capricious" regulations.

CONCLUSION

For the reasons stated above, this Honorable Court should grant the petition for a writ of certiorari to review the issues raised herein on the merits.

Respectfully submitted,

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APPENDIX

enjoin harassing or persecutory the application of a regulation or order issued under this title to a person who is a party to litigation before it.

Had Congress intended as condition to injunctive relief an exhaustion of administrative remedies, it could have done so. In regard to this Act, Congress determined not to do so where the specific conditions existed as set forth in [illegible]. Under such conditions the Act contains specific provision for direct judicial intervention. The intention of Congress, therefore, as evidenced by the express language of the statute is that administrative remedies need not be exhausted before seeking judicial relief from "arbitrary capricious" regulations.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MURRAY ANDERSON, ET AL., On Behalf of Themselves and Others Similarly Situated, *Plaintiffs*,

v.

JOHN T. DUNLOP, ET AL., *Defendants*

CIVIL ACTION No. 1621-73

CLASS ACTION

Order

(Aug. 24, 1973)

This cause having come on before the Court on Plaintiffs' Motion for Preliminary Injunction; the Court having considered the Plaintiffs' and Defendants' memoranda and the affidavits submitted and having heard argument of counsel; and

The Court further having determined that Subpart L of the Phase IV Oil Regulations as applied to Plaintiffs and the class is arbitrary and capricious within the meaning of the applicable section of the Economic Stabilization Act, as amended; and that Subpart L as so applied to Plaintiffs and the class violates the due process clause of the Fifth Amendment to the United States Constitution; and

The Court having further found that Plaintiffs and the class have made a sufficiently strong showing that they are likely to prevail on the merits herein and that irreparable harm will result if a Preliminary Injunction is not issued; and that the public interest would be served by the issuance of a Preliminary Injunction herein; and it further appearing that Defendants have acted on grounds generally applicable to Plaintiffs and the class.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants, their agents, employees and attorneys are hereby temporarily enjoined from in any way applying to the

Plaintiffs and the class Phase IV Oil Regulations, Subpart L; or in any way implementing or enforcing said regulations as they relate to Plaintiffs and the class.

BARRINGTON D. PARKER
United States District Judge

Findings of Fact and Conclusions of Law

(Aug. 24, 1973)

This cause came before the Court on August 22, 1973 on Plaintiffs' Motion for Preliminary Injunction. The Court, having considered plaintiffs' and defendants' memoranda, the affidavits and statements submitted and having heard argument of counsel, makes the following Findings of Fact and enters the following Conclusions of Law:

Findings of Fact

1. Plaintiffs are service station dealers selling retail gasoline under the brand name of a major gasoline supplier pursuant to agreements with said suppliers. They bring this action on behalf of themselves and a class composed of all other dealers similarly situated.

2. Pursuant to Section 203 of the Economic Stabilization Act of 1970, as amended (Public Law 91-379, 84 Stat. 799, August 15, 1970; Public Law 92-210, 85 Stat. 734, December 22, 1971; Public Law 93-28, April 30, 1973) (Act), the President, on August 15, 1971, established a freeze on prices, rents, wages and salaries for a limited period and established the Cost of Living Council (Council).

3. Defendants are members of the Council and were appointed by the President pursuant to Executive Order 11695.

4. Among the objectives of the Act and Cost of Living Council Regulations which are pertinent to this case are to moderate the rate of inflation which has existed in the United States during the first six months of 1973; to continue expansion of the United States economy to fulfill its potential with further increases in employment; and to reduce long run inflationary forces.

5. In response to sharply rising domestic crude oil and wholesale and retail gasoline prices in April 1973, the Director of the Council ordered his staff to study the subject and to make policy recommendations designed to alleviate these problems.

6. On July 18, 1973, the President declared that among the general policy considerations to be applied in promulgating the current Phase IV price control regulations are the following: That prices be permitted to rise as much as costs rise, in dollars per unit of output without any profit margin on the additional costs; and that Phase II exemptions for firms with sixty employees or fewer be repeated in Phase IV.

7. A study was made and recommendations for regulations were submitted to the Director and reviewed and approved by the President's Oil Policy Committee and subjected to staff review within the Executive Branch. These proposed regulations were published in the Federal Register, for comment on July 20, 1973. On August 17, 1973 the Council issued Phase IV Oil Regulations.

8. Plaintiffs and the class are the only class of retailers employing sixty or fewer individuals who are not exempt from the regulations.

9. There is no factual or statistical information or material justifying the failure to make the small business exemption under the regulations applicable to plaintiffs and the class.

10. There is no rational relationship between the objectives of the regulations and the denial to plaintiffs and the class of their small business exemption.

11. All segments of the economy and all other classes of retailers are allowed under the regulations to pass through increased costs on a dollar for dollar basis with the exception of plaintiffs and the class.

12. Plaintiffs and the class have been singled out from among all other classes in that they must absorb all their nonproduct cost increases since January 10, 1973.

13. Plaintiffs and the class have been singled out from all other classes and in particular, all petroleum firms, in that they must absorb all product cost increases after August 1, 1973.

14. Plaintiffs and the class are the only class whose principal supplier is allowed to pass on his costs both in product and otherwise to Plaintiffs and the class while they, in turn, may not pass on such costs in their sales to the general public.

15. The Phase IV January 10, 1973, date for the establishment of price margins for plaintiffs and the class is an arbitrary date, bearing no reasonable relationship to the ends sought to be achieved under the Regulations.

16. The application of Subpart L of the August, 1973 Oil Regulation to plaintiffs and the class would require plaintiffs and substantial members of the class to go out of business or otherwise sustain substantial and severe economic injury.

17. The establishment of a refiner-retailer class within Subpart L, with separate and distinct regulations applicable thereto, has no rational foundation and confers a competitive advantage upon said class not available to plaintiffs and the class.

18. Establishment of a refiner-retailer class within Subpart L is inconsistent with the objectives of the Act and the Regulations.

19. Requiring plaintiffs to exhaust their administrative remedies would result in irreparable harm, in that in this case, time is crucial to protect the rights of plaintiffs and the class.

Conclusions of Law

1. This Court has jurisdiction over this action pursuant to Section 211 of the Economic Stabilization Act, as last amended by P.L. 93-28 (April 30, 1973).

2. Venue is proper.

3. Subpart L of the Phase IV Oil Regulations as applied to plaintiffs and the class is arbitrary and capricious within the meaning of the Act.

4. Subpart L as applied to plaintiffs and the class discriminates against plaintiffs and the class and violates the due process clause of the Fifth Amendment.

5. The provisions and regulations of Subpart L as applied to plaintiffs and the class are arbitrary and discriminatory and bear no rational relationship to the ends sought to be achieved by the Act or of Phase IV regulations in general and, therefore, violate the due process clause of the Fifth Amendment.

6. Plaintiffs have made a sufficiently strong showing that they are likely to prevail on the merits of this suit.

7. The preliminary injunction should be granted.

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

Slip Opinion

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Oct. 10, 1973

Before TAMM, Chief Judge, VAN OOSTERHOUT and HASTINGS, Judges. VAN OOSTERHOUT, Judge.

This is a timely appeal by John T. Dunlop and the officers and members of the President's Cost of Living Council (hereinafter collectively referred to as CLC) from order of the United States District Court for the District of Columbia, filed August 24, 1973, granting plaintiffs a temporary injunction. The injunction restrains CLC from "in any way applying to Plaintiffs and the class Phase IV Oil Regulations, Subpart L; or in any way implementing or enforcing said regulations as they relate to Plaintiffs and the class." The named plaintiffs are Murray Anderson and Joseph J. Grish.

Anderson operates a service station at Waycross, Georgia, handling Texaco brand gasoline and products. Grish operates two service stations, one located in Frazer, Michigan, and the other in Sterling Heights, Michigan, both of which are employed in the business of retailing Marathon brand gasoline and products. Both plaintiffs are retailers of brand name gasoline of major gasoline suppliers pursuant to an agreement with the supplier.

Plaintiffs allege that they bring this action on behalf of themselves and a class which consists of all service station dealers selling retail gasoline under the brand name of a major gasoline supplier pursuant to agreement with such supplier. It is asserted the class consists of about 165,000 members.

Jurisdiction of the District Court is based upon § 211(a) of the Economic Stabilization Act of 1970 as amended,[1] here-

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[1] P.L. 91-379 as amended by P.L. 93-28, April 30, 1973, and P.L. 91-210 December 22, 1971.

inafter called the Act. Our jurisdiction is founded on § 211(b) of the Act.

This court on motion of CLC, resisted by plaintiffs, granted a stay of the District Court order granting the temporary injunction, observing that such action in no degree reflects a decision on the merits and that the stay is solely to maintain the status quo until a hearing on the merits of the appeal may be had. The hearing upon the appeal was advanced to September 17, 1973, and an accelerated briefing schedule was established and followed. Application of plaintiffs to the Chief Justice and subsequently to Mr. Justice Rehnquist to vacate our stay order was denied. We deferred consideration of plaintiffs' motion to reconsider our stay order until hearing on the merits on September 17. Oral arguments on appeal were made on September 17, 1973, and the case was submitted.

Plaintiffs do not challenge the validity of the price Stabilization Act nor do they question the right of the President under the executive orders he issued to delegate to CLC the powers conferred upon him to regulate the price of crude oil and petroleum products.

Plaintiffs in brief state that their attack is confined to final Phase IV regulations, Subpart L. The gist of plaintiffs' contentions as evidenced by their complaint and brief is that the Phase IV, Subpart L regulations, as applied to plaintiffs and their class are arbitrary and capricious and are invidiously discriminatory, in violation of the Fifth Amendment.

Plaintiffs do not sell propane, No. 2 fuel oil, diesel fuel, or natural gas derivatives. The only regulated product they sell is gasoline. As retailers of gasoline, their markup is controlled by § 150.352, Phase IV regulations, Subpart L. Such section provides that the ceiling price of a retailer for a particular octane of gasoline at a particular retail outlet shall be the weighted unit average cost of the seller's inventory of that item on August 1, 1973, plus the actual mark-

up applied by the seller at that outlet to the actual cost of gasoline on January 10, 1973, except that in no event shall the seller be required to use a markup of less than 7.00 cents a gallon in computing a selling price. Thus retailers who had a markup of more than 7.00 cents a gallon on January 10, 1973, were permitted to use such markup in computing their selling price, while retailers who because of a price war or for other reasons, had a markup of less than 7.00 cents a gallon on January 10, 1973, were permitted to use a 7.00 cents per gallon markup.

Plaintiffs assert that said regulation is discriminatory because it does not permit them to pass through increases in production costs since August 1, 1973, or increases in non-product costs such as rent, labor, insurance and maintenance. Plaintiffs also assert that they are the only retailers under Phase IV who are not allowed to pass through increases in product and non-product costs while their refiner suppliers may pass on their increased costs, and may do so through retail stations operated by the refiners, and thus receive preferential treatment. Complaint is also made that plaintiffs are discriminated against by not permitting them the small business exemption allowed generally to employers of less than sixty persons.

The trial court heard the temporary injunction application upon affidavits filed by the parties. The trial court's memorandum opinion reflects that it granted the injunction upon the basis of its conclusion of law, based upon its fact finding, that Subpart L of the Phase IV regulations as applied to the plaintiffs and their class are arbitrary and discriminatory and bear no rational relationship to the objective sought to be obtained by the Act and the Phase IV regulations, and that the regulations violate the due process clause of the Fifth Amendment.

Plaintiffs urge that the court's findings are based on undisputed facts. We disagree. CLC has filed extensive affidavits in the trial court in support of its contention that

the regulations attacked are within the powers conferred upon the President by the Act and delegated to CLC, and that the regulations are reasonable and appropriate to accomplish the objective of the Act.

CLC states that the order granting temporary injunction should be reversed by reason of errors committed by the trial court in the following respects:

1. Failure to require plaintiffs to exhaust available administrative remedies.

2. Failure to satisfy basic requirements for granting injunctive relief.

3. Finding that Subpart L regulations are violative of the process clause of the Fifth Amendment.

4. Finding the individual plaintiffs properly represented a class consisting of some 165,000 independent retailers of brand name gasoline products.

For reasons hereinafter stated, we find that the plaintiffs have failed to exhaust available administrative remedies and that the order granting the temporary injunction should be reversed on that ground. Since such ruling is dispositive of this appeal, we do not reach nor express any view upon the other issues raised by CLC.

This court has squarely held in *City of New York* v. *New York Telephone Co.*, 468 F.2d 1401 (Em.App. 1972), that the well-established doctrine of exhaustion of administrative remedies applies to actions arising under the Economic Stabilization Act. The reasonableness and logic of such holding is clearly demonstrated in Chief Judge Tamm's opinion in that case and need not be repeated here. In *City of New York*, we held:

> "Clearly then, in light of the policy considerations and the legislative history, exhaustion is required in the context of this proceeding unless we find the administrative remedy provided inadequate." 468 F.2d 1401, 1404.

We are satisfied that an adequate administrative remedy is available. Section 207(b) of the Act provides:

> "(b) Any agency authorized by the President to issue rules, regulations, or orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking interpretation, modification, or recission of, or seeking an exception or exemption from, such rules, regulations, and orders. If such person is aggrieved by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the agency. The agency shall, in regulations prescribed by it, establish appropriate procedures, including hearings when deemed advisable, for considering such requests for action under this section: * * *"

CLC, in conformity with the foregoing statutory direction, has in the Phase IV procedural regulations, 38 F.R. 21985, provided in § 155.41 to .43, a reasonable procedure for applying for individual or class exception, and in § 155.61 to .63, has provided procedures for applying for exemption or re-classification.

Charles Owens, administrator of the mandatory oil control program, in his affidavit filed in the trial court states that CLC has provided special procedures for expeditious consideration of individual claims for relief from the regulations to prevent serious hardship or inequities and has also provided for extensive monitoring of the entire retail gas system, and that plaintiffs have not requested an exception.

In *Meyers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-51 (1938), the Court holds:

> " * * * no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767-768 (1947), the Court holds:

> "The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision."

In *City of New York*, we stated:

"Concepts of administrative autonomy also require that the Commission be given an opportunity to discover and correct its own errors. In this respect we have noted in our cases to date a healthy trend towards amendment of regulations when error or oversight has been pointed out to the Commission. Such autonomy lends itself to prompt, consistent price control policies which are essential to the administration of a nationwide program of price control. Finally, frequent deliberate skirting of the Commission may well result in an

> erosion of effectiveness and public confidence in the Commission which we must recall is a 'collaborative instrumentalit[y] of justice.' "

Such language has special application to the petroleum situation here involved. Petroleum prices were not significantly controlled in the early phases of price control. When it became apparent that the nation's supply of crude oil was inadequate to meet the nation's needs, the price of petroleum products began to rise rapidly. In fixing prices, it was determined that consideration had to be given to the necessity of importing foreign crude oil which commanded higher prices than domestic crude and to offer price incentives which would encourage new domestic production. Detailed studies were made by experts in the full spectrum of the petroleum industry and reports were received and considered by CLC. Public notice was given of proposed regulations and opportunity was afforded interested parties to express their views. The plan adopted imposed a ceiling on crude oil and upon the retail price of gasoline and other petroleum products. The preamble to the Phase IV Subpart L regulations sets forth at length the reason for imposing ceilings on crude oil and products derived therefrom, and the procedure followed in fixing ceilings at the refinery and retail levels. Included therein is the following statement:

> "The Council intends to monitor the ceiling prices of gasoline, No. 2 heating oil and No. 2-D diesel fuel and will make periodic upward adjustments in the ceiling prices for those products to account for increased cost of imports and of domestic crude."

Plaintiffs in their petition allege only by way of conclusion that they have exhausted all administrative remedies. No proof was offered that they have done so. The trial court made no finding on the exhaustion of remedies issue but instead determined "requiring plaintiffs to exhaust

their administrative remedies would result in irreparable harm, in that in this case, time is crucial to protect the rights of plaintiffs and the class."

We hold that adequate administrative remedies were provided by the Act and regulations. There is no basis in the record for determining that application to CLC for exception, reclassification, or exemption would not receive fair consideration.[2]

The exhaustion of remedies point was presented in the trial court by CLC by motion to dismiss. As we determined in *City of New York*, the Act requires exhaustion of available adequate administrative remedies before resort to the courts is available. No factual basis here exists which would warrant a departure from the well-established rule that administrative remedies should be exhausted before resort to the courts. The order granting the preliminary injunction is reversed and the case is remanded to the trial court with directions to dismiss by reason of plaintiffs' failure to exhaust available administrative remedies.

Reversed and remanded.

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[2] We note that subsequent to the trial court's order, Dr. Dunlop in his news letter of September 14, 1973, announced that all retail dealers in gasoline and other petroleum products were asked to supply information on forms provided as to their prices, costs and margins on specified dates, and the further statement was made that on the basis of such information and information independently gathered by CLC and its monitoring program, the CLC will act promptly to make appropriate upward adjustments in ceiling prices. On September 28, 1973, an announcement was made by CLC of the revision of retail ceiling prices and the method of computing them with respect to gasoline which would result in increases ranging from 1 cent to 2½ cents per gallon. Such ceiling increases apparently do not meet all of the plaintiffs' objections to the gasoline ceiling regulations and thus render the case moot, but does give further support to the view that applications for relief because of inequities or hardships would receive fair consideration.

ECONOMIC STABILIZATION PROGRAM
COST OF LIVING COUNCIL
WASHINGTON, D.C. 20508

Sep. 26, 1973

Honorable John L. McClellan
Chairman
Senate Committee on Appropriations
Suite 3241
New Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to express serious concern over the amendment to H. J. Res. 727, adopted by the House September 25, 1973, and now before your Committee, which would have the effect of dismantling the ceiling price system for gasoline, home heating oil and diesel fuel established by the Cost of Living Council. The amendment reflects a serious lack of understanding of the Council's petroleum regulations, ignores fundamental differences between the pricing structures of refiner-retailers and other retailers, and fails to recognize the need to protect American consumers from inflationary increases in the prices they must pay for petroleum products.

The amendment is ill-advised and I want to express in this letter my reasons for opposing it.

First, the Committee should be aware of the magnitude of the increases which have been experienced in petroleum prices this year. From January through August 1973, the fuel oil component of the wholesale price index increased at an annualized rate of 72.5%. For gasoline, the annualized rate of increase has been 63.6%. For all refined petroleum products, it has been 56.6%. These figures contrast sharply with the figure for all industrial commodities, which increased at a rate of 10.8%, and are significantly higher than

the figures for the processed foods and feed component—about which there has been so much public concern—which has increased at a rate of 47.7% over the same period.

The same picture appears in the consumer price index. Gasoline at retail has increased at an annualized rate of 12.7%, fuel oil has increased at a rate of 22%, while the overall CPI has increased at an annualized rate of 9.3%. So the first point to be made is that petroleum products have contributed disproportionately to inflation. It is for this reason that the Cost of Living Council designed specialized regulations for the petroleum industry in Phase IV.

The Council gathered extensive dealer markup data as the basis for its decision to establish ceiling prices at retail for the sale of gasoline. It is important to emphasize, in this connection, that while the markups themselves deal in pennies per gallon, their aggregate impact upon the economy is substantial. Approximately 100 billion gallons of gasoline will be sold at retail in 1973. Thus, an increase in markup which is reflected in a price increase of a penny per gallon represents, in the aggregate, a price increase of $1 billion per year which must be paid by American motorists.

Information derived from industry and other sources collected by the Council in planning Phase IV showed that during the period of the feared gasoline shortage this Spring, retail gasoline dealers substantially hiked their prices and obtained significantly increased markups. These markups were, on the average, far above what dealers had previously obtained and were, in the Council's view, inflationary. Dealer markups on retail sales of gasoline during 1972 averaged 6.74 cents per gallon. However, by July 1973, the average markup increased to 7.60 cents per gallon, an increase of 13%. The Council determined to reduce these markups to the levels which they occupied on January 10, 1973, the last day of Phase II, and which are more consistent with historic markup levels. At the same time, the Council took note of the fact that in some areas price wars

were being waged in January, with the result that dealer markups were depressed on January 10. Consequently, it established a *minimum* markup of 7 cents per gallon which is above the *average* markup retailers were able to apply in all of 1972.

Under the Council's rules, dealers may add this markup (the January 10, 1973 markup or 7 cents, whichever is higher) to the actual cost of their products on August 1, 1973. Thus, the ceiling price is not the January 10, 1973, price. It is the actual cost of the product on August 1 plus the January 10 or 7 cents markup. This rule applies to the approximately 90% of the Nation's retail gasoline outlets which are not directly owned and operated by refiners.

Different ceiling price rules apply to retail sales made directly by refiners because products sold through these outlets reach the retail market through a series of intra-corporate transfers, rather than arms-length transactions establishing costs and markups. The structure of these refiner-retailers and their pricing mechanisms simply do not lend themselves to price control on the same basis as other retailers and artificial symmetry cannot produce an effective or equitable price control mechanism.

Most refiners are vertically integrated firms which engage in the production, manufacture and distribution of an array of petroleum products. Phase IV rules respond to this reality by establishing a comprehensive system of different rules applicable to the particular characteristics of the petroleum industry at all levels—from the oil that is pumped out of the ground to the gasoline sold to motorists and the heating oil sold to home owners. The benchmark date for control of refiners prices is May 15, 1973. That is the date for establishing ceiling prices on domestic crude oil; it is the date for establishing base prices of the array of petroleum products manufactured and sold by refiners; and it is the date for establishing ceiling prices for retail sales of gasoline, home heating oil and diesel fuel by refiners.

Specifically, the ceiling price for retail sales of these three products by refiner-retailers is the May 15, 1973, selling price plus the increased costs of imports incurred between May 15 and August 1, 1973. It is important to note that this ceiling price is based upon the refiner-retailers *May 15 selling price* adjusted for increased costs of imports incurred *before* August 1, as distinct from the rule for other retailers which establishes a ceiling price based upon the *August 1 cost* of the product *plus* its *January 10 markup or 7 cents whichever is higher.*

Moreover, the May 15 selling price for refiner-retailers is generally no higher than the prices they were charging in August 1971 which were frozen in the first freeze of the Economic Stabilization Program and remained unchanged during all of Phase II, unlike the prices of other retailers, which in most cases, were not controlled during most of Phase II because of the small business exemption. In both cases, however, the ceiling prices for refiner-retailers as well as other retailers are fixed and may not be increased until authorized by the Council.

It should also be pointed out that the Council regulates only the sale of petroleum products by most independent retail dealers. The remainder, and more profitable part of their sales (tires, batteries, accessories and repairs), are exempt from controls under the small business exemption. Such sales by refiner-retailers, however, are controlled by the Phase IV rules since they do not qualify for the small firm exemption. Sales of non-petroleum items generally account for larger profits to independent dealers than the sale of gasoline. Markups on non-petroleum products range from 33% to 50%.

The point I would make, therefore, is that while there are differences in the ceiling price rules that apply to refiner-retailers on the one hand and to other retailers on the other hand, these differences are premised upon vital differences in the particular economic characteristics of the firms being

regulated and fairly reflect the different price behavior which the firms have experienced under the stabilization program. The charge that the differences in treatment were motivated by a desire to favor refiner-retailers or to discriminate against other retailers—or that the differences have this effect—is wholly without foundation and does not consider the practical economic need to treat different customary operating practices differently in a comprehensive price controls system.

The thrust of the House amendment is to require the Cost of Living Council to ignore economic conditions as they exist in the marketplace and to tie the Council's hands in implementing a system to control rapidly escalating prices in the petroleum sector. As the Committee knows, the Council is now conducting its first periodic review of the ceiling prices established under the regulations, and I am committed publicly to increasing those ceilings in the next few days to reflect the increased costs which the rules permit to be passed through the distribution system on a dollar-for-dollar basis. This is in fullfillment of a commitment which the Council made in August when the regulations were originally issued.

To require the Council now, in addition, to perform major surgery on the regulatory framework is to invite serious inflationary consequences. It would also add greatly to public confusion. That is particularly true in the case of gasoline where the Council has required the posting of ceiling prices and minimum octane ratings by all gasoline retailers, to enable members of the public to assist in the enforcement and administration of these price ceilings.

It may well be that changes are warranted in the Council's regulations. The petroleum industry is complex and requires complicated regulations if it is to be effectively controlled. My colleagues and I are, of course, prepared to meet with appropriate Committees of the Congress to discuss the desirability of suggested changes and to do so in an orderly and responsible manner. But I am unalterably

opposed to hasty and ill-conceived action which has not been thoughtfully examined, which is clearly premised upon misconceptions and which threatens to unravel the existing controls program in a highly inflationary sector of the economy.

I, therefore, strongly urge the Committee to eliminate the House amendment from the Bill which it reports to the floor.

Sincerely,

/s/ JOHN T. DUNLOP
John T. Dunlop
Director

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Economic Stabilization Act of 1970

§ 207.

"(b) Any agency authorized by the President to issue rules, regulations, or orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking interpretation, modification, or recission of, or seeking an exception or exemption from, such rules, regulations, and orders. If such person is aggrieved by the denial of a request for such action under the preceding sentence, he may request a review of such denial

by the agency. The agency shall, in regulations prescribed by it, establish appropriate procedures, including hearings when deemed advisable, for considering such requests for action under this section."

§ 211.

"(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall ben enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of Section 1292(b) of title 28, United States Code; except that reference in such section to the Courts of Appeals shall be deemed to the Temporary Emergency Court of Appeals.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the

Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

Title 38 of the Code of Federal Regulations

SUBPART C—Exceptions

§ 155.41 Purpose and scope

Exceptions from the provisions of Part 150 of this title may be granted for the purpose of preventing or correcting a serious hardship or gross inequity.

(a) All persons requesting exceptions shall file their applications with the key IRS District Office which serves the district in which their corporate headquarters are

domiciled, except that persons who are: (1) Insurers subject to Subpart M of Part 150 of this chapter, shall file with the Internal Revenue Service, Insurance Group (Stabilization), P.O. Box 995, Washington, D.C. 20044 and (2) Institutional and noninstitutional providers of health services subject to subpart O of Part 150 of this chapter, shall file with the Cost of Living Council, 2000 "M" Street, NW., Washington, D.C. 20508. All requests for exception, wherever filed, must conform to the requirements set out in § 155.11 of this part.

(b) Initial actions on requests for exception may be made by the Council or IRS, as appropriate, in accordance with Cost of Living Council Number 37, 38 FR 21836 (August 13, 1973).

(c) This subpart establishes the rules of the Council governing the disposition of requests for exceptions.

§ 155.42 Initial action on requests for exception.

After considering the record, the Council will make a decision and issue an appropriate order:

(a) When the Council grants an exception it will serve upon the applicant a copy of its order.

(b) When the Council denies an exception in whole or in part, it will serve upon the appellant a copy of its order, which will contain a statement of the grounds for denial, and advise the applicant that he may request reconsideration pursuant to Subpart F of this part.

§ 155.43 Requests for reconsideration.

Any person aggrieved by an initial action of the Council under this subpart may request reconsideration pursuant to Subpart F of this part. The Council will not consider that a person appearing before the Council has exhausted his administrative remedies until he has filed a request for reconsideration under Subpart F and final action has been taken . . . .

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No. 73-771

In the Supreme Court of the United States

OCTOBER TERM, 1973

MURRAY ANDERSON, PETITIONER

v.

JOHN T. DUNLOP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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The respondents invite the attention of the Court to the following facts, which show that the petition was not timely filed.

The petitioners instituted suit in the United States District Court for the District of Columbia to enjoin implementation and enforcement of the Phase IV petroleum industry regulations with respect to themselves and other retailers of gasoline they allege to represent.

The district court granted petitioners' motion for a preliminary injunction by order entered on August 24, 1973 (Pet. App. 1a). The Temporary Emergency Court of Appeals reversed the decision of the district court on

October 10, 1973, and remanded with directions to dismiss (Pet. App. 6a).

The petition for certiorari was filed on November 12, 1973, 33 days after the entry of judgment. Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (Supp. II, 1972) 1904,[1] upon which this Court's jurisdiction concededly depends (Pet. 2), explicitly prescribes a 30-day period for filing a writ of certiorari to review judgments of the Temporary Emergency Court of Appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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[1] Section 211(g) of the Act, 85 Stat. 750, 12 U.S.C. (Supp. II, 1972) 1904 provides in pertinent part:

> Within thirty days after entry of any judgment of order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. * * *